Supreme Court, U.S.
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No. 94-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the mandate of 42 U.S.C. § 9613(g)(2)—that a declaratory judgment on liability for environmental response costs is binding in all further actions to recover response costs—should be applied to an order quantifying attorneys' fees and costs that were awarded, consistent with the law at the time, as response costs under CERCLA in a declaratory judgment affirmed on appeal and from which *certiorari* was denied prior to this Court's decision in *Key Tronic Corp. v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994).

2. Whether a declaratory judgment deciding Petitioners' entitlement to recover attorneys' fees and litigation expenses as response costs, pursuant to 42 U.S.C. § 9613(g)(2) is binding under *res judicata* or collateral estoppel principles regardless of a subsequent change in law in *Key Tronic v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994), which determined that response costs under CERCLA do not include attorneys' fees and expenses incurred in litigation.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I. INTRODUCTION

The Petitioners' reply will refute two erroneous arguments made by Respondent Detrex Corporation ("Detrex") in Respondent's brief in opposition. First, Respondent Detrex erroneously argues that after this Court denied Respondent's petition for writ of *certiorari*, the trial and appellate courts' finding that Detrex was liable for response costs, which include attorneys' fees, was not final. Respondent's Brief in Opposition, pp. 9-10, 12. On the contrary, the issue of liability for attorneys' fees was final at the time the petition for a writ of *certiorari* was denied and all that remained open for further litigation was the quantification of recoverable attorneys' fees.

Second, Respondent erroneously argues that the decision of the Seventh Circuit, if allowed to stand, will very likely have little impact on future litigants. Respondent's Brief in Opposition, p. 8. On the contrary, the Seventh Circuit's decision, if not reversed by this Court, will have a substantial adverse effect on future environmental litigation by rendering § 9613(g)(2) of CERCLA [1] meaningless and wreaking havoc on Superfund litigation across the country.

II. PETITIONERS WERE AWARDED A FINAL JUDGMENT THAT RESPONDENT WAS LIABLE FOR ATTORNEYS' FEES

The Seventh Circuit, in its opinion, recognized that, in the first appeal, it had affirmed, with an immaterial exception, the declaratory judgment that awarded Amcast Industrial Corporation ("Amcast") and Elkhart Products Corporation ("EPC") attorneys' fees and expenses in an undetermined amount. *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995), App., p. 3(a). The Court of Appeals also correctly recognized that, in the first appeal, it decided upon full hearing and with finality that response costs included attorneys' fees. *Id.*, App. p. 7(a). As the Seventh Circuit stated, "[w]e had decided the issue of entitlement 'finally.'" *Id.*

This being true, the only issue left for litigation was the quantification of recoverable attorneys' fees, *i.e.*, whether the fees claimed were reasonable. The issue of Detrex's liability for payment of attorneys' fees was finally determined—the only issue that remained was the amount of those fees.

Respondent admits that litigation under CERCLA usually proceeds in "two distinct phases, *i.e.*, liability and damages" and that Congress intended that the declaration of liability have application in subsequent actions

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[1] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.

without regard to the actual amount or categories of response costs. Respondent's Brief in Opposition, p. 12. Moreover, Respondent Detrex admits that the Seventh Circuit's "first opinion confirmed Detrex's liability under one section of" CERCLA. Respondent's Brief in Opposition, p. 2. A finding of liability for response costs would necessarily include a determination as to the kinds or categories of response costs remaning to be quantified. Having recognized the distinction between liability for response costs and damages or amount of those costs, it is disingenuous for Detrex to assert that the kinds or categories of recoverable costs are not finally determined in the liability stage of a CERCLA case.

The Seventh Circuit's disposition of the attorneys' fees issue is inconsistent with its disposition of another issue raised by Detrex on appeal, *i.e.*, alleged noncompliance with the National Contingency Plan ("NCP"). In the court below, Petitioners moved to dismiss that portion of Respondent Detrex's appeal which sought to (1) excuse Detrex from any liability for response costs, on the ground that appellees had failed to comply with the NCP, and (2) excuse Detrex from having to pay attorneys' fees. The Seventh Circuit dismissed Detrex's appeal on the issue involving noncompliance with the NCP reasoning:

> "It is true that our opinion does not mention the NCP issue, but in upholding Detrex's liablity for response costs *we necessarily rejected every ground on which Detrex had opposed that liability*. If Detrex thought we had somehow overlooked that ground, it should have filed a petition for rehearing. It did not." (Emphasis added.)

Order, App., p. 38(a). Likewise in the first Detrex appeal, the Seventh Circuit, in affirming the declaratory judgment that Detrex was liable for response costs, which included attorneys' fees, necessarily rejected every ground on which Detrex had opposed liability for fees, including its argument that attorneys' fees are not recoverable un-

der CERCLA.[2] Thus, the only issue regarding attorneys' fees open for determination was the amount or quantification of those fees, *not* liability for those fees. The determination that Respondent was liable for attorneys' fees became final when this Court denied Detrex's petition for a writ of *certiorari*.

III. DENYING BINDING EFFECT TO THE DECLARATORY JUDGMENT THAT RESPONDENT DETREX WAS LIABLE FOR RESPONSE COSTS, WHICH INCLUDE ATTORNEYS' FEES, WOULD RENDER § 9613(g)(2) OF CERCLA MEANINGLESS

This Court must grant the petition for a writ of *certiorari* to review the Seventh Circuit's decision because that decision, if it stands, will cause a substantial adverse effect upon future environmental litigation.

Section 9613(g)(2), 42 U.S.C., provides that "the court shall enter a declaratory judgment on liability for response costs or damages *that will be binding on any subsequent action or actions to recover further response costs or damages*." (Emphasis added.) This unambiguous language means that a finding in an initial enforcement action that various responsible parties are liable for categories of response costs cannot be relitigated in a subsequent action or proceeding.

This is important because it is a common practice in CERCLA litigation for the Government to initiate an enforcement action against numerous potentially responsible parties ("PRPs"). It is well settled that once the

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[2] In deciding the motion to dismiss in Detrex's second appeal, the Seventh Circuit declined to dismiss Detrex's appeal as to its liability for attorneys' fees because the law of the case doctrine, according to the Seventh Circuit, does not bar reconsideration. Order, App., p. 38(a). In this petition, Petitioners do not rely on the doctrine of law of the case, but assert that the unambiguous language of § 9613(g)(2) of CERCLA makes the declaration that Respondent was liable for response costs, which include attorneys' fees, final and binding and not subject to relitigation.

liability of PRPs has been established for categories of response costs that liability cannot be relitigated in a subsequent contribution action in which the Court is asked to allocate damages among Defendant PRPs. *United States v. Kramer*, 757 F. Supp. 397, 413 (D.N.J. 1991) ("But the court's discretion in allocating damages among the defendants during the contribution phase does not affect the defendants' liability."); *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) ("[T]he Court will consider contribution of damages at a subsequent proceeding since it does not affect defendants' initial liability.").

One logical consequence of Respondent's interpretation of § 9613(g)(2) is that once a finding of liability for categories of response costs is established, the issue of liability for categories of response costs could be relitigated in subsequent contribution actions. Such a result is at odds with the Seventh Circuit's opinion in this case regarding liability for non-attorney fee response costs and well-settled principles of *res judicata*. Moreover, such a result could lead to a serious breakdown of the federal judicial system. The only sensible and fair meaning of the statutory language that "a declaratory judgment on liability for response costs or damages [that] will be binding on any subsequent action or actions," 42 U.S.C. § 9613(g)(2), is that liability for categories of response costs such as attorneys' fees, once decided and affirmed on appeal, cannot be relitigated in a subsequent action or proceeding to quantify those costs. Thus, the Seventh Circuit erred in failing to give the declaratory judgment that Respondent was liable for response costs, which include attorneys' fees, binding effect. The Seventh Circuit's decision could substantially complicate environmental litigation pending in the federal courts by permitting disruptive and inefficient relitigation of findings of liability for categories of response costs, which the unambiguous language of § 9613(g)(2) of CERCLA was intended to avoid.

CONCLUSION

In conclusion, this petition for a writ of *certiorari* presents an important and significant question under CERCLA law which this Court should address. Accordingly, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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